Supreme Court, U.S.
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No. 88-1340

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

CHARLES F. WISHART,
and BOBBIE S. WISHART,
Appellants,
vs.
LESLIE M. BATES,
and, RANDALL A. BATES,
Appellees,

APPEAL FROM THE SUPREME COURT
OF THE STATE OF FLORIDA

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL BRIEF

CHARLES F. WISHART, Esquire,
Attorney at Law,
and,
BOBBIE S. WISHART, his wife,
410 West Bloomingdale
Brandon, Florida 33511-7402

Phone: (813) 685-1240

Appellants appear pro se.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

LESLIE M. BATES (BOGGS)

Case No.86-2408

Appellant/Cross-Appellee,

v.

BOBBIE SUE WISHART and CHARLES F. WISHART,
Appellees/Cross-Appellants.

Opinion filed August 7, 1987.

Appeal from nonfinal order
of the Circuit Court for Hillsborough County
Peter J. T. Taylor, Judge.

Appellant, Pro se.

Charles F. Wishart, Brandon,
for Appellees/Cross-Appellants.

Ryder, Acting Chief Judge.

In 1983, appellant, Leslie M. Bates (Boggs), petitioned for a divorce alleging that her marriage to Randy Bates was irretrievably broken and sought custody of the parties' only child, Tiffany Michelle Bates. Appellant additionally sought a court order requiring the return of the child to her custody. She alleged that her husband had removed the child from their marital home and delivered the child to one Charles Wishart (the step-grandfather of the child) and Bobbie Sue Wishart (a grandmother of the child). The Wisharts, appellees here, were joined as necessary party defendants in the child custody matter pursuant to sections 61.1306 and 61.131

Florida Statutes (1983).

On December 28, 1983, the trial court ordered that the temporary residence of the minor child be with Bobbie Sue Wishart, the paternal grandparent, every Monday through Friday. Appellant was to have the child on weekends.

On February 26, 1985, a different trial judge entered a final judgement holding that the Bates' marriage was irretrievably broken and granted shared parental responsibility to the parents. Appellant was given primary residency of the child. The Wisharts appealed the final judgement. The natural father did not contest the order of the court below.

A panel of this court held that the Wisharts, as grandparents, "should have been afforded an opportunity to be heard and present evidence at the custody hearing." *Wishart v. Bates*, 487 So.2d 342 (Fla. 2d DCA 1986). The panel reversed and remanded for further proceedings consistent with the opinion. The Wisharts subsequently filed a motion to enforce mandate arguing that the decision made void the trial court's award of primary custody to appellant, and that the child must be returned to Bobbie Sue Wishart's temporary custody pursuant to the December 28, 1983 order. We denied the motion to enforce mandate.

Since the panel's denial of the Wisharts' motion to enforce mandate, step-grandfather Wishart has filed numerous motions; so numerous, we believe the harried, but able trial judge must be reeling from that malady so aptly described in *Dubowitz v. Century Village East, Inc.*, 381 So.2d 252, 253 (Fla. 4th DCA 1979). He had not petitioned for a custody hearing. On June 30, 1986, the trial court held a case manage-

ment hearing. At that hearing, the trial judge granted the Wisharts appellate costs pursuant to Florida Rules of Appellate Procedure 9.400(a)(1)(2)(4). The trial judge ruled that the opinion of this court, to which we earlier alluded, did not "completely reverse the final judgement... and therefore did not require a return to the temporary primary and/or custody status enjoyed by the Wisharts immediately prior to the final judgement." The trial judge is imminently correct in that ruling. The trial judge, thereafter awarded the Wisharts visitation rights with the child on every other saturday. This timely appeal followed.

Appellant raises two points with up. First, the trial court erered in awarding appellees their appellate costs. Second, the court erred in granting appellees any visitation rights at all. Appelles raise one point on cross-appeal: the second district's opinion permitting the grandparents a hearing in the custody of the child rendered the prior trial court's order granting appellant custody void ab initio. We will deal with each in point of order.

Florida Rule of Appellate Procedure 9.400(a) provides that, "Costs shall be taxed in favor of the prevailing party unless the court orders otherwise . . . . Costs shall be taxed by the lower tribunal on motions served within 30 days after issuance of the mandate." Florida Rules of Appellate Procedure 9.400(c) provides that, "Review of orders rendered pursuant to this rule shall be by motion filed in the court within 30 days of rendition." The judgement awarding costs to appellees was entered on August 22, 1986. We have jurisdiction to review the Court's order because apppellant filed her notice of appeal within thirty days of the rendition of the judgement awarding appellant costs. The trial court erred in awarding appellees appellate costs. We reverse the trial court's or-

order awarding appellees appellate costs as we hold appellees were not the prevailing parties in the prior appeal. By returning the matter to the trial court in the prior appeal, we did not overturn the trial court's award of custody to to appellant. We merely granted the appellees an opportunity to be heard at a custody hearing. As was evidenced by our denial of appellees' motion to enforce mandate which had urged the return of temporary custody to appellees, custody was to remain with appellant.

As to appellant's second point, we observe that the trial court also erred in granting appellees visitation rights. "An order granting visitation rights to a nonparent of a child whose custody has been awarded to a fit parent is unjustified and unenforceable." *Sheehy v. Sheehy*, 325 So.2d 12 (Fla. 2d DCA 1975); *Tamargo v. Tamargo*, 348 So.2d 1163 (Fla. 2d 1977); *Rodriguez v. Rodriguez*, 295 So.2d 328 (Fla. 3d DCA 1974). Appellant has been found to be a fit parent.

Thus, we reverse and vacate the trial court's award of appellate costs as appellees were not the prevailing parties in the prior action. We also reverse and vacate the trial court's award of visitation rights to the appellees.

On cross-appeal appellees argue that the trial court erred by not finding that our opinion permitting the step-grandfather and grandmother a hearing on the custody of the child rendered the prior trial court's order granting appellant custody was void ab-initio. Appellees argue that because the prior order was void ab initio, appellees should be reinstated with the temporary custody of the child. As was previously discussed, we did not reverse the trial court's prior custody judgement. We merely granted the appellees an opportunity for a hearing in which to present evi-

dence as to the child's best interests with regard to her custody. Accordingly, we find no merit in the point on cross-appeal and affirm the trial judge's ruling thereon.

Reversed in part, affirmed in part.

READGILL, J and PATTERSON, DAVID F., Associate Judge, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

CHARLES F. WISHART, and
BOBBIE SUE WISHART
Appellants, Case No. 85-1128

RANDALL A. BATES, and
LESLIE M. BATES (BOGGS)
Appellees.

Opinion filed April 2, 1986.

Appeal from the Circuit Court
for; Hillsborough County
Manuel Menendez, Judge.

No appearance for Appellees.

PER CURIUM.

Appellants appeal the denial of their petition for custody of their granddaughter.

The court having reviewed the record finds that appellants should have been afforded an opportunity to be heard and present evidence at the custody hearing.

We therefore reverse and remand for further proceedings consistent herewith.

SCHEB, A.C.J., and CAMPBELL and SANDERLIN, J.J., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

MAY 1, 1986

CHARLES F. WISHART, and
BOBBIE SUE WISHART,

Case No. 85-1128

Appellants,

v.

RANDALL A. BATES and
LESLIE M. BATES

APPELLEES.

Counsel for appellees having filed a motion for rehearing in the above styled case, upon consideration, it is

ORDERED that said motion is hereby denied without prejudice to raise issue on remand to trial court.

A TRUE COPY
ATTEST:
/S/
CLERK DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Lee Ellen Acevedo
Charles F. Wishart
Randall A. Bates

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OFTHE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

FAMILY LAW DIVISION

IN RE: THE MARRIAGE OF

NO. 83-7250

LESLIE M. BATES, Petitioner/Wife and Counter-Respondent, DIV. "D"

and,

RANDALL A BATES, Respondent/Husband, and Cross-Respondent,

-- vs. --

CHARLES F. WISHART and BOBBIE SUE WISHART, Respondents, Cross-Petitioners and Counter-Petitioners.

FINAL JUDGEMENT OF DISSOLUTION OF MARRIAGE

THIS CAUSE Came on before this Court for a two day Final Hearing beginning on December 3, 1984. Present before the Court were the Wife, LESLIE M. BATES, and her attorney, PAUL M. TABIO, ESQ.; the Husband, RANDALL A. BATES, who appeared in proper person; the paternal grandmother, BOBBIE SUE WISHART; and the paternal step grandfather, CHARLES F. WISHART, ESQ., who also appeared as attorney of record for the WISHARTS. The Court, having heard the testimony of the parties and their various witnesses, having reviewed the numerous exhibits admitted in evidence, having heard argument of counsel, having examined the file and record herein, and being otherwise fully advised upon the premises,

finds as follows:

a) The Court has jurisdiction of the parties, the subject matter herein, and the minor child, TIFFANY BATES.

b) The Court finds the mariage between the Wife, LESLIE M. BATES, and the Husband, RANDALL A. BATES, is irretrievably broken and should be dissolved.

c) The Court, as requested by counsel, has taken judicial notice of numerous court files and records, both criminal and juvenile, referred to in the Pre--Trial Orders entered herein, as well as the case law cited by counsel.

d) As to the Court's Order to Show Cause directed to JERRY L. HEDRICK, M. D., the Court finds that he is not in willful contempt of this Court.

e) The Court also finds that CHARLES F. WISHART and BOBBIE SUE WISHART, are not in willful contempt of this Court.

f) The Court also finds that the Wife's Motion to Strike the Grandparents' Amended answer hsould be denied and instead treated as a denial of the allegations in the Affirmative Defenses filed by the Wisharts.

g) As to the personal property of the Husband and Wife , the Court finds that each should retain those items of personalty presently in his or her respective possession, including that certain 1978 Ford Mustang on which testimony was received.

h) Additionally, the Court finds that the Wife's

application for alimony, if not abandoned, should be denied.

i) The Court further finds that in respect to the joint debts incurred by the Husband and Wife during their marriage, which includes a hospital bill to Tampa General resulting from the birth of their child, that the parties are equally responsible for said obligations and each should therefore pay one-half of same.

j) In respect to attorney's fees and costs, the Court finds each party should bear their own.

k) The Court additionally finds that each of the parties herein desire the custody of the minor child, TIFFANY; Neither of the parties are unfit, nor have any of the parties abandoned the minor child. The natural parents of TIFFANY, who are LESLIE and RANDALL, have not relinquished their parental rights. The natural parents, accordingly, have a superior right to the custody of a child over any third parties provided same is in the best interest of the child. The best interest of the child has been the Court's primary concern throughout this cause. Based on the extensive testimony and evidence presented through the Final Hearing as well as testimony presented at previous heaings, the natural mother, LESLIE M. BATES, the natural father, RANDALL A. BATES, and the paternal grandmother and paternal step grandfather, BOBBIE SUE WISHART and CHARLES F. WISHART, are all fit and proper to have the care, custody and control; but it is the opinion of the Court that the best interest of the child, TIFFANY BATES, would be promoted by the parents being granted the shared parental responsibility in respect to the child. The primary residence of the child should be with her mother, LESLIE M. BATES,

and the secondary residence should be with her father, RANDALL A. BATES, with frequent and continuing contact afforded the non-residential parent as provided for hereinafter as well as contact with the WISHARTS.

l) The Court finds that the wife requires financial assistance toward the support of the minor child and the Husband has the ability to pay. The Wife's request for support arrearages should be denied because the paternal grandmother, BOBBIE SUE WISHART and the paternal step grandfather, CHARLES F. WISHART, have provided for the expenses of the child for the majority of time this cause has been in litigation.

It is therefore, upon consideration thereof,

ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction of the parties; the subject matter herein and the minor child, TIFFANY BATES.

2. That the marriage between the Wife, LESLIE M. BATES, and the husband,RANDALL A, BATES, is irretrievable broken and the bonds of matrimony heretofore existing between them are hereby forever dissolved.

3. Than JERRY L. HEDRICK, M.D. is not found to be in willful contempt of this Court.

4. That BOBBIE SUE WISHART and CHARLES F. WISHART, are not found to be in willful contempt of this Court.

5. That the Wife's Motion to Strike the grandpar-

ent's Amended Answer be and the same is hereby denied and instead, it is treated as a denial of the allegations contained in the Affirmative Defenses filed by the WISHARTS.

6. The husband and wife are hereby declared to be the owner of those tems of personal property which are presently in his or her respective possession, including that certain 1978 Ford Mustang.

7. The Wife's application for alimony is hereby denied.

8. That the husband and Wife shall each pay one-half of the joint debts incurred during the marriage which includes a bill to Tampa General Hospital for the birth of their minor child, TIFFANY BATES.

9. Each party shall be responsible for their respective attorney's fees and costs incurred in this cause.

10. The shared parental responsibility in respect to the minor child, TIFFANY BATES, is hereby granted to the husband and wife. The primary residency of the child shall be with her mother, LESLIE M. BATES, and the secondary residence shall be with her father, RANDALL A. BATES, with frequent and continuing contact afforded the non-residential parent as provided for herein.

11. The husband, RANDALL A. BATES, shall pay to the wife, LESLIE M. BATES, as and for child support for the minor child of the parties, TIFFANY BATES, the sum of $40.00 per week; payable at the rate of $173.20 per month, together with the Clerk's handling fees, with payment to commence on December 21, 19-84 and continuing each and every month thereafter until such time as the child attains 18 years of age,

becomes self supporting, marries, dies or until further Order of thisCourt, whichever shall occur first. Further, each payment shall be made to the Clerk of this Court, Support Department, and shall be made in U.S. Currency, money orders, cashier's checks or certified check. Money orders and checks shall be made payable to the Clerk of the Circuit Court, and if mailed, shall be addressed as follows: Support Department, Clerk of the Circuit Court, Post Office Box 1110, Tampa, Florida 33601. Each party shall notify the Support Department within five (5) days of any change of residence address.

It has been represented to the Court that the parties' present mailing addresses are:

LESLIE M. BATES
P.O. Box 4
Williams Road
Seffner, Florida 33584

RANDALL A BATES
410 West Bloomingdale
Brandon, Florida 33511

12. The Husband shall have visitation with the minor child on alternate week-ends from Friday at 5:30 P. M. until Sunday at 8:00 P.M., commencing with Friday, December 14, 1984 and on every other week-end thereafter. In addition, he shall have the right to visit with the child on two evenings per week. If the parties cannot agree on what days they are to be, they will be on Tuesdays and Thursdays from 5:30 P. M. until 8:30 P.M. Also, the Husband is required to provide prior notice to the Wife within 24 hours of said visitation, unless in the case of an emergency, should he intend not to exercise one of the evening visitations. Further, the wife shall notify the Husband of a specific place at the specified time to pick the child up if he does not notify the Wife that he does not intend to exercise said visitation.

The Husband shall have the minor child for Thanksgiving in odd numbered years from the Sunday preceeding Thanksgiving at 8:00 A.M. until the Sunday following Thanksgiving at 8:00 P.M. The Wife shall have the child for this same period in even numbered years.

The husband shall have custody of TIFFANY for seven days prior to Christmas Day at 8:00 A.M. until Christmas at 2:00 P.M. in odd numbered years. In even numbered years, he shall have custody of the child beginning at 2:00 P.M. Christmas Day for a seven day period, ending at 8:00 P.M. on the seventh day.

The husband shall have custody of TIFFANY from the Sunday preceeding Easter at 8:00 A.M. through Easter Sunday at 8:00 P.M. in even numbered years.

Commencing in 1985 and through 1988, the Husband shall have custody of TIFFANY for a period of four (4) weeks during the summer months. That will be the first two weeks in July and the first two weeks in August or as otherwise agreed to by the parties. The following two weeks, Mr. Bates shall have custody of TIFFANY for the last two weeks in June, the second and third week in July and the second and third week in August. Thereafter, Mr. Bates shall have custody of the child for eight continuous weeks during the summer months commencing with the week immediately after the conclusion of the public school year. Should for any reason the Public School Board decide to change the public school year, then said visitation shall begin the last week in June and last for eight continuous weeks.

In addition to the previous set-out visitation schedule, in odd numbered years, regardless how the sum-

mer visitation works out, Mr. Bates shall have the primary costody of TIFFANY on her birthday from 8:00 A.M. until 8:00 P.M. unless of course, she is designated to be with him at the time in the course of the summer vacation provided for hereinabove.

He shall also have the costody of the child every year as early as 8:00 A.M. until the following morning at 8:00 A.M., unless otherwise agrees to by the parties, on his birthday and on Father's Day, which is celebrated annually on the third Sunday in June.

13. The paternal grandmother, BOBBIE SUE WISHART, shall be entitled to specific visitation with TIFFANY for one full day every two months, to include overnight visitation. In the event the parties cannot agree on the date, it will be every odd-numbered month, commencing with January, 1985, on the third Sunday, beginning actually at 8:00 P.M. on the preceeding Saturday evening and ending at 8:00 P.M. This visitation will be in addition to any visitation she might enjoy during the period of time that the child is in the care, custody and control of the Husband.

14. In the event the parties or any of the parties hereto cannot resolve a conflict relating to the proper care, custody and control of TIFFANY, they are required to seek appropriate, competnt assistance, a resolution center, counselling or other professional person to assist the family. This should be followed to its conclusion prior to any party seeking further relief from the Court.

15. The Husband and Wife are required to provide each other with a telephone number where they can be reached for emergency purposes and to advise each other as to the residence address where the mi-

nor child will be residing. There are to be no telephone calls to each other, other to arrange or cancel visitation or in case of an emergency.

The wife is required to keep the Husband advised as to Tiffany's health, specifically any medical condition she may be having and to advise the Husband within twenty-four hours of any and all doctors' visits or any and all prescriptions that the child is taking or in the event of an emergency. Additionally, the wife will inform the Husband of any contemplated surgery. This will apply to the husband during the time that he has custody of the child as well as to the grandmother when she has the child for visitation as provided for herein, should such an emergency arise.

Further, each parent is required to provide complete and total access to the medical records of TIFFANY to the other, including the signing of releases with regard to the doctors and dentists treating the child to release such records and information to the other parent.

16. If the parties can agree, one of them should obtain a medical insurance policy for the use and benefit of the minor child. All medical and dental expenses incurred by or on behalf of the minor child shall be equally borne by the parties on a fifty-fifty basis.

17. Neither party, including their parents, i.e., the child's grandparents, shall voice any criticism of the other in the presence of the child nor will any party force or encourage the child to take sides in any conflict arising between them. All parties concerned shall not do anything to interfere with the maintenance of a relationship of love and affection between the child and the other parent, nor shall any of the parties do anything to estrange the child from the o-

ther.

18. The child shall not be removed form (sic) the State of Florida without prior approval of this Court or without the written approval of the other parent. Neither parent nor any grandparent is allowed to remove the child from the State of Florida, either directly or through any third party, without prior Court approval or written permission of each parent; for more than a two-week period. In the event of any contemplated travel out of the State of Florida for two weeks with the child, the other parent, or course, will be notified as to the location of the child, the intended location and proposed method of travel.

19. Neither the parents or the WISHARTS shall use any controlled substances unless said substances are pursuant to lawful prescription in the presence of the minor child or during that period of time when the child is residing with them. Failure to comply with this may subject the party failing to comply with this provision to contempt of Court.

Neither parent shall, while TIFFANY is residing with them, cohabit with an unrelated member of the opposite sex.

20. The child is required to keep the Doctor's appointment presently scheduled for December 28, 1984.

21. The Court retains jurisdiction of the parties and this cause to enforce the terms and provisions hereof.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida this 26th day of February, 1985, nunc pro tunc, December 4, 1984.

Manuel Menendez, Jr.
CIRCUIT JUDGE

IN THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

FAMILY LAW DIVISION

IN RE: The Marriage of

RANDALL A. BATES, Husband,
Respondent and Cross-Respondent,

CASE NO. 83-7250

and

DIVISION D

CHARLES F. WISHART and BOBBIE SUE WISHART, Paternal Grandparents,
Respondents, Cross-Petitioners
and Counter-Petitioners.

ORDER REGARDING TEMPORARY PRIMARY RESIDENCY OF MINOR CHILD AND TEMPORARY VISITATION, AND ORDER CONTINUING THE FORMER ORDER TO SHOW CAUSE

This matter came before the Honorable Ralph Steinberg on December 20, 1983, in the nature of an emergency hearing at the request of the assigned Judge, the Honorable Robert W. Rawlins, Jr., and upon Judge Rawlins' Order dated December 15, 1983, denominated respectively "Order Placing Child Temporarily with the Department of Health and Rehabilitative Sevices for the purpose of Examination and Temporary Care" and "Orderr Concerning Temporary Custody of Minor Child and Order to Show Cause". All parties were present; in addition, the Wife was represented by John W. Hoft, Jr., Esquire, and the Husband by Thomas R. Fay, Esquire. The Court heard testimony and argument of counsel, and was otherwise fully advised in the premises.

It is, therefore,

ORDERED AND ADJUDGED:

1. That the temporary primary residency of the minor child, TIFFANY MICHELLE BATES, shall be with the paternal grandmother, BOBBIE SUE WISHART, every Monday at 8:00 A.M. until the following Friday at 6:00 P.M.

2. That the Wife, LESLIE M. BATES, shall pick up the child at the residence of BOBBIE SUE WISHART each Friday at 6:00 P.M. and return the child to the primary residence at 8:00 A.M. the following Monday and shall pick up the child at 6:00 P.M. each Tuesday and return the child to the primary residence the following Wednesday at 8:00 A.M.

3. That the Husband, RANDALL A. BATES, and Wife, LESLIE M. Bates, shall have liberal and free access to the child at all times upon reasonable notice.

4. That the Wife shall deliver the minor child to the residence of the paternal grandmother on Christmas Day, December 25, 1983, at 10:00 A.M. and shall pick the child up at 12:00 noon that same day.

5. That the treating pediatricians for the minor child, TIFFANY MICHELLE BATES, to-wit, Doctors Gerald R. Hough and Patricia N. Jeansonne are hereby requested to consult with Dr. Thomas R. Griewe, 2250 W. Buffalo Avenue, Tampa, Florida, regarding the care and treatment of said minor child.

6. That the Paternal Grandmother, BOBBIE SUE WISHART, shall have the authority and responsibility

regarding necessary medical care and treatment for the minor child, TIFFANY MICHELLE BATES, during any time that the residence of the minor child be with her.

7. That a hearing on the Order to Show Cause dated December 15, 1983, previously entered by Judge Rawlins shall be and the same is hereby CONTINUED for determination on the merits before Judge Rawlins or his successor as he may see fit.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, on this 28th day of December 1983.

Ralph Steinberg

Copies to: CIRCUIT JUDGE

Randall A. Bates

Leslie M. Bates
c/0 John W. Hoft, Jr., Esquire

Charles F. and Bobbie Sue Wishart

Thomas R. Fay, Esquire

John W. Hoft, Jr., Esquire

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

FAMILY LAW DIV.

IN RE: THE MARRIAGE OF

No. 83-7250

LESLIE M. BATES (BOGGS), wife/ petitioner and counter-respondent

DIVISION "D"

and

RANDALL A. BATES, Husband/respondent, Counter-petitioner and cross-respondent

and

CHARLES F. WISHART, Cross & Counter-petitioner and BOBBIE SUE WISHART, Cross & Counter-petitioner

ORDER GRANTING MOTION FOR INVOLUNTARY DISMISSAL OF THE WISHART COUNTER-CLAIM FOR CUSTODY OF TIFFANY BATES

At the conclusion of the case presented by CHARLES F. WISHART and BOBBIE SUE WISHART, the step-grandparent and natural grandparent respectively, on their counter-claim seeking permanent custody of their granddaughter, Tiffany Bates, and considering the evidence and all reasonable inferences which could be drawn from the evidence in a light most favorable to the counterclaimants, the court has concluded that the counter-claimants have shown no right to the relief sought and consequentiy the counter-defendant, LESLIE BATES', [natural mother of Tiffany Bates] motion for involuntary dismissal pursuant

to Rule 1.420 (b) of the Florida Rules of Civil Procedure should be granted.

Because of the extraordinary judicial history of this case beginning in 1983, the court wishes to make the following observations:

This marriage dissolution action between Leslie Bates and Randall Bates was commenced in 1983. The Wisharts were joined as parties in the original action because of their involvement in the custody of Tiffany Bates. On June 2, 1983 the Wisharts filed a counter-claim alleging that the natural parents were unfit to have custody of their own child and affirmatively sought to have custody granted to them. Leslie Bates, the natural mother, filed an answer to that counter-claim on September 21, 1983. Thereafter, a Pre-trial Order dated August 24, 1984, was entered by Judge Manuel Menendez, Jr., stating in paragraph 10(b) as follows:

> "Wisharts' request to grant custody of Tiffany to Wisharts and all testimony pertinent thereto shall be heard and considered by this Court at the Final Hearing in this cause." At the conclusion of that Final Hearing held before Judge Menendez in December, 1984, the court entered a Final Judgement which clearly recited that the court had considered the claims of everyone involved, including the Wisharts, as to the custody of Tiffany Bates and specifically found from the evidence presented that both the natural mother and the natural father were fit parents. Shared parental responsibility was awarded to the parents and the child was to have her primary physical residence with the mother, Leslie Bates. The finding of fitness of the natural parents necessarily determined the Wisharts' claim for cus-

tody against them because natural parents are entitled to custody of their own children unless they are found to be unfit. On April 25, 1985, Wisharts' motion for rehearing was denied. Thereafter the Wisharts took an appeal and the appellee, Leslie Bates, did not make an appearance before the Appellate Court.

On April 2, 1986, the Appellate Court rendered the following opinion:

"The appellants [WISHART] appeal the denial of their petition for custody of their granddaughter.

The court having reviewed the record finds that appellants should have been afforded an opportunity to be heard and present evidence at the custody hearing.

We therefore reverse and remand for further proceedings consistent herewith."

It is clear from this opinion that the Second District Court of Appeals was under the impression that Judge Menendez had not afforded the Wisharts a hearing on their counter-claim.

Upon remand the undersigned, as presiding judge of Family Law Division "D", went forward with another hearing on the WISHARTS' counter-claim. The court has held hearings on the Wisharts' counter-claim for five days on the following dates: June 23, June 24, September 15, September 16, and December 14, 1987. During the presentation of their case the Wish- arts repeatedly offered in evidence exhibits which had been earlier tendered to and received by Judge Menendez. The record reflects that the Wisharts offered and Judge Menendez

received in evidence on their behalf at least (19) photographic, other physical objects and documentary exhibits. Just for an example, Wisharts' Exhibit #4 received by this judge bore an evidence stamp by Judge Menendez indicating he had received the identical exhibit as Wisharts' Exhibit #17 baby's clothing). This is just one example of this matter. On more than one occasion during the five days of hearings conducted before the undersigned, it became apparent that the undersigned was hearing oral testimony which had also been presented to Judge Menendez for his consideration on the custody claims.

The record would seem to be clear that the Wisharts were in fact given an opportunity to be heard and to present evidence on their custody claim before Judge Menendez in 1984 and they have now had an additional five days of hearing in 1987 before the undersigned on the same claims.

It is, therefore,

ORDERED AND ADJUDGED, that the motion of the counter-defendant, LESLIE BATES, natural mother of the minor child, Tiffany Bates, for involuntary dismissal of the counter-claim for custody filed by CHARLES F. WISHART and BOBBIE SUE WISHART be and the same is hereby granted and said counter-claim is dismissed.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 17th day of December 1987, NUNC PRO TUNC December 14, 1987.

/S/

VERNON W. EVANS, JR., CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

FAMILY LAW DIV.

IN RE: THE MARRIAGE OF

No. 83-7250

LESLIE M. BATES (BOGGS), wife/ petitioner and counter-respondent

DIVISION "D"

and

RANDALL A. BATES, Husband/respondent, Counter-petitioner and cross-respondent

and

CHARLES F. WISHART, Cross & Counter-petitioner and BOBBIE SUE WISHART, Cross & Counter-petitioner

MOTION FOR NEW TRIAL and REHEARING OF THE ORDER BY THE HONORABLE VERNON W. EVANS, Jr., DATED THE 14TH DAY OF DECEMBER 1987 AND ENTITLED "ORDER GRANTING MOTION FOR INVOLUNTARY DISMISSAL OF THE WISHART COUNTER-CLAIM FOR CUSTODY OF TIFFANY BATES"

Comes now Charles F. Wishart and Bobbie Sue Wishart his wife, (CHARLES, BOBBIE, the WISHARTS or WISHART) parties herein and files this their Motion for New Trial and Rehearing pursuant to **Rule 1.530, Fla. R. Civ. P.** and shows:

PARTIES:

1. The parties and their respective status are listed in the above styled caption which conforms to the caption used in the judgement in question herein.

2. Leslie M. Bates [Boggs] (LESLIE) and Randall A. Bates (RANDY) are the mother and father of Tiffany Michelle Bates (TIFFANY), the step, and natural granddaughter of CHARLES and BOBBIE respectively.

3. The WISHARTS were made necessary parties to the above styled cause pursuant to **§ 61.131, Florida Statutes (1983)** since (1) they had helped to raise TIFFANY for the first 6 months of her life, (2) when LESLIE left RANDY on the 11th day of May 1983, RANDY gave TIFFANY to the WISHARTS, his stepfather and mother respectively, for safe keeping since TIFFANY was once again sick, and in addition (3) RANDY gave the WISHARTS a letter of guardianship as contemplated by **§ 39.01(23), Florida Statutes (1977)** which granted them, legal custody so as to care for TIFFANY, which could not be modified save through a lawful hearing.

4. Additional data will be added as to status as required.

CITATIONS:

Citations shall be made to the prepared Appendix (Pages 1 to 361) accompanying this motion with cites then to the pages, paragraphs and lines as for example A: pg. 15, ¶ 7 line 1 which reads:

> The court having reviewed the record finds that appellants should have been afforded an op-

portunity to be heard and present evidence at the custody hearing.

5. To facilitate a complete answer to the Order in question, the entire order, including the style which was reproduced above, has been made a part of this motion, in relevent segments, with the paragraphs indented, single spaced and bolded for clarity. Turning therefore to the first paragraph we find.

At the conclusion of the case presented by CHARLES F. WISHART and BOBBIE SUE WISHART,

6. The WISHARTS deny that they had concluded their case.

7. While going through the motions they object to the trial being held at all.

8. First, RANDY was never made a part of the trial.

9. His participation came up before The Honorable Peter Taylor, Judge Evan's immediate predecessor, and Judge Taylor ruled that RANDY would be considered as an active party until further notice.

10. The procedures for removing RANDY pursuant to **Rules 1.250(b), 1.420b), and 1.090(d), Fla. R. Civ. P.** have not been invoked.

11. Judge Evans and LESLIE have ignored him, over WISHARTS objections (A: pg. 209, ¶¶ E. and F.), and although RANDY has many interests at stake concerning the outcome of this litigation yet RANDY has never been served by either LESLIE or Judge Evans as an examination of the record including the present

order will show, a clear violation of **Rule 1.080(a) and (h), Fla. R. Civ. P.**

12. In addition, this matter was set for trial by Judge Evans, without compliance with the provisions of **Rule 1.440, Fla. R. Civ. P.** (A: pg. 208 ¶ 27(B)).

13. Judge Evans unilaterally set the matter for trial.

14. Had the procedure been followed, WISHART would have responded by showing the following facts as should prevent the trial being forced upon them:

(a) The nature of the WISHARTS' concern for TIFFANY was the medical (A: pg. 283, last line of ¶ 4) and moral neglect of TIFFANY by her mother LESLIE.

(b) WISHART started with full custody, which was modified by the Honorable Ralph Steinberg, from that to primary residency (in BOBBIE A: pg. 1 ¶ 1. to pg. 2 ¶ 2. and Cf. pg. 2 ¶¶ 5 and 6) which had allowed them to care for her, have a beneficial effect on TIFFANY'S health in spite of LESLIE'S poor care, and as well they could gather fresh evidence of the ongoing pattern of neglect (A: pgs. 302 to 313).

(c) This was illegally modified by The Honorable Manuel Menendez, Jr., who put the matter to trial in violation of **Rule 1.440, Fla. R. Civ. P.** in that there was a motion to strike (A: pgs. 4, ¶ f; pgs. 5 and 6 ¶ 5; and, pgs. 94, 95 and 135) WISHARTS' last pleading (A: pgs. 87, ¶ 3, and 90 to 93) such that the matter was not at issue and could not be pretried or tried until the motion was settled, as says the decisions of **Leeds v. C. C. Chemical Corp.**, 280 So.2d 718, 719 Fla. App. 3d DCA, 1973) and **Ellis v. Ellis**, 242 So.2d 745 (Fla. App. 1971) and as a part of the trial

Judge Menendez found LESLIE and RANDY "fit" and gave them joint custody of TIFFANY.

(d) This was done, notwithstanding the fact that Carole Priede, Court Counsellor, who wrote the investigative reports for the Court (A: pgs. 276 to 284; pgs. 293 to 297; and pgs. 298 to 299) was in the hospital as she recently testified.

(e) The court must obey the rules, and to do otherwise is beyond their jurisdiction, such that whenever the court violates a rule, it's actions are void.

(f) Judge Menendez therefore tried the matter illegally, which produced a final judgement that was void-ab-initio (A: pgs. 3 to 11).

(g) WISHART established that fact by appeal to enforce inter-alia **Rule 1.440, Fla. R. Civ. P.** (A: pgs. 48 to 62; pg. 116 ¶ f to pg. 117; pg. 135; and, pgs. 136 to 165) and in due course WISHART succeeded (A: pgs. 12, 14 and 15), or so it seems from a plain reading of the language of the Opinion of the Second District.

(h) An analysis of the meanings of the terms used is set out in the appendix at pages 186 to page 191 paragraph 5.

(i) The effect of a reversal being to void the "Final Judgement", then, and particularly since the Judgement is void on it's face (A: pg. 4 ¶ f and pg. 5 ¶ 5) WISHART has from the beginning treated the final judgement as void and now voided. (Cf. A: pg. 192 ¶ 3 to end of page).

(j) Unfortunately, the lower court judges distorted the order, without reviewing the record on appeal as the appellate panel had (A: pg. 12 ¶ 7; and Cf. pgs. 48 to 62) and took the opinion to be a finding that the WISHARTS were never given a hearing, that the Final Judgement was valid, that LESLIE was fit, and that all the WISHARTS would be given and that grudgingly was a "hearing" somewhat in the vein, of giving a man a fair trial before we hang him.

(k) The net effect, was that the WISHARTS are being tried in the Court House lunch room, by gossip, and the record, which speaks for itself has been ignored.

(l) The WISHARTS were never restored to their status prior to the void Final Judgement, and are not even given the benefit of the visitation granted to BOBBIE therein, so that we have the anomaly of a void judgement which is used to keep TIFFANY from the WISHARTS care, custody and control, while being ignored as to the privileges it affords at least BOBBIE (A: pg. 8 ¶ 13).

(m) therefore after Judge Hodges left, no contempt was determined, to the point that Judge Evans will not even consider LESLIE'S contempts, and the WISHARTS only saw TIFFANY a few hours since April 29, 1985, and not at all for over a year.

(n) The net result has been that no fresh evidence, or might it be said precious little evidence was obtained, save for the medical neglect inadvertently exposed by Margaret Murphy of HRS, when she attached a letter to her report from Dr. Jeansonne, with the intent to show that TIFFANY was well and well cared for, when the reverse was true as WISHART proved (Cf. A: pg. 335).

(o) When the proof of medical neglect requires continuing proof of "...a recurring pattern of care which on a repeated basis constitutes medical neglect . . . ." (A: pg. 302), and which WISHART in the past sustained, to the point that Drs. Lipschutz, Hough, Hedrick and Hillseth (who testified before Judge Evans) concurred that TIFFANY'S best interest would be best served with the WISHARTS, it is manifestly unfair to violate the purpose of **§ 61.131, Fla. Stat. (1983)** by separating TIFFANY from the WISHARTS without an opportunity for them to be heard and present evidence.

(p) Since that is the basic minimum requirement and definition of due process of law, and is also the same language used by the Second District (A: pg. 12), it is clear that the WISHARTS have lost their power to protect TIFFANY without due process of law, and by the obstinacy of the trial, and now appellate court judges to enforce what they know to be the law, they have breached another point of due process, namely that a trial be fair.

(q) What is fair about illegally enforcing a void and voided order to keep TIFFANY from the WISHARTS while not so much as allowing them to see her, and then having the gall to complain, as Judge Evans has, that the evidence is all years old.

(r) Such would then be the arguments, had Judge Evans tried to put the matter to trial when the Courts, by violating the law, made the trial difficult if not imposible, and certainly imposible when it was the deliberate intent of the Judges, with a few ex-exceptions, to strip TIFFANY from the WISHARTS by all means fair or foul.

(s) To put it simply, WISHARTS' position from the beginning was that such a "trial" is nothing more than a mistrial, and they have not even begun to put on their case, much less have they concluded their case.

15. Moving along, WISHART would show that they had not voluntarily rested.

16. They had been denied the opportunity to be the respondents who had custody of TIFFANY and to go second since the pleadings from the beginning (A: pg. 63 ¶ 6 to pg. 64 ¶ 7; and pgs. 166 to 172) reflect WISHART has TIFFANY and LESLIE wants her back.

17. To exascerbate the matter, Judge Evans, refused to consider evidence relating to the moral values by which LESLIE was to be determined fit, rejecting **State ex rel. Singleton v. Woodruff**, 13 So.2d 704, 705, (Fla. 1943).

18. Without a common yardstick as to right and wrong our society is collapsing.

19. HRS'S standard is that to make a moral judgement would be to impose religion on people which they consider as a violation of that "Constitutional requirement of separation of Church and state", at least in their rationale.

20. The end result is that LESLIE could live with 5 men at the same time and still be fit to raise TIFFANY in HRS'S eyes.

21. Judge Evans went further and would not receive evidence that LESLIE is a liar, and had lied inter-alia to the Court.

22. She admits that she has the right to lie, and has lied, so long as she is not under oath (A: pg. 263 line 11 to pg. 264 line 21.

24. But she did not follow that rule (Cf. A: pg. 360 ¶ 2).

25. WISHART plead, but was refused the opportunity to prove up what is a clear fact from the record, that LESLIE has directly and indirectly through her attorney's lied to the Court with impunity (Cf. A: pg. 68 to 85 and pg. 169 ¶ 15 to pg. 170 ¶ 1)

26. **Ryan v. Ryan**, Fla. 1973, 277 So.2d 266 did away with the defense of recrimination save for lying to the Court, for which activity LESLIE may be thrown out of court.

27. WISHART has plead the clean hands defense, but Judge Evans will not allow proof of LESLIE's lying, even when they are spread across the record.

28. Since Margaret Murphy testified that WISHARTS witnesses were not contacted, save for character witnesses, her report must then be based on what LESLIE and her "husband" Richard Larry Boggs (BOGGS) told her, or the witnesses that LESLIE supplied, and it is one short step to impeach that report, which WISHART has worked hard to do, by showing that LESLIE and BOGGS are careless with the truth.

29. Thus WISHART did not wish to conclude the case once started, but to somehow get the truth in, such that Judge Evans stopped WISHART from fully examining Mrs. Murphy to impeach her report which was full of lies and fabrications.

30. The closest WISHART came to concluding their case in chief was when they found themselves cut off from proving deceit, unclean hands etc., and having run out of matters to go into, and expecting a mistrial due to Judge Evans rulings, they "rested". CHARLES thereafter stated and Judge Evans allowed that he could pursue (at least) more of the HRS workers involved in Mrs. Murphy's report or with TIFFANY.

31. When CHARLES tried to finish his examination of Mrs Murphy on the 14th of December 1985 he was not allowed to.

32. Likewise BOBBIE was not allowed to examine her.

33. The WISHARTS were forced to rest under protest, but with an assurance, as they had before Judge Menendez of a mistrial.

34. The WISHARTS have yet to be allowed a lawful hearing to deprive them of their lawful authority over TIFFANY.

the step-grandparent and natural grandparent respectively, on their counter-claim seeking permanent custody of their granddaughter, Tiffany Bates,

35. One of the great problems with this case, is that all of the judges treat this as a grandparent rights case. and considering that grandparents have little rights have treated the WISHARTS with disdain if not contempt.

36. The WISHARTS perceive TIFFANY to be their granddaughter, and TIFFANY loves them as such, but this case came about from a different direction.

37. **Section 61.131, Florida Statutes (1983)** does not operate from a special blood relationship between the child and the persons caring for her.

38. The only requirement is possession by a person other than a natural parent to invoke the statute to force inquiry as to the anomaly of another than the natural parent(s) providing for a child.

39. The Court perceives the WISHARTS as interlopers, but the WISHARTS perceive themselves as having taken the responsibility for caring for TIFFANY when LESLIE was found incapable and not inclined to care for her.

40. LESLIE wanted her rights but refused to meet her responsibilities, and the WISHARTS took up the responsibilities she discarded.

41. A close examination of the record will show that it is LESLIE'S rights that have been put forceably forward by the Courts, and that to the harm of TIFFANY, who for instance has never even seen by Judge Evans, even before issueing this recent order.

42. In their zeal to cut off the WISHARTS as grandparents, the whole purpose of **Section 61.131, Florida Statutes (1983)** was thwarted, the opportunity to have a voice speak on behalf of a child, who needs a guardian other than it's own natural parents.

43. Someone should look out for TIFFANY and stop trying to impress a standard solution on TIFFANY'S life when she needs much more.

44. LESLIE has on numerous occasions for example lied concerning TIFFANY'S medical care and condition, to the harm of TIFFANY.

> **and considering the evidence and all reasonable inferences which could be drawn from the evidence in a light most favorable to the counter-claimants, the court has concluded that the counter-claimants have shown no right to the relief sought and consequently the counter-defendant, LESLIE BATES', [natural mother of Tiffany Bates] motion for involuntary dismissal pursuant to Rule 1.420 (b) of the Florida Rules of Civil Procedure should be granted.**

45. To make that conclusion, Judge Evans had to ignore evidence on morals, medical neglect testimony and exhibits including those from Drs. Hillseth, Hedrick, Lipschutz and Hough.

46. WISHART proved the pattern of neglect, extended it from 1982 through to December 1985 and to February 1986, a hard task with no contact, but might one consider how simple it would have been after so many years of being accused of neglecting TIFFANY, for LESLIE to discipline herself to care for TIFFANY so as to make the issue go away, yet she did not.

47. As WISHART testified, TIFFANY was very sick on and before the 18th day of December 1985 A: 335, she was in LESLIE'S care and was receiving no medical treatment.

48. WISHARTS request for use of RANDY'S visitation was granted, and LESLIE was to give TIFFANY to the WISHARTS on the 18th.

49. To avoid obeying Judge Falsone, LESLIE delivered TIFFANY to RANDY (the first time he had seen her in over 9 months) and when the WISHARTS protested, RANDY gave TIFFANY back to LESLIE.

50. Then and only then did LESLIE take TIFFANY to Doctor Jeansonne to have an excuse for not delivering her to the WISHARTS.

51. That is medical neglect, and of a particularly cruel form.

52. LESLIE didn't care that TIFFANY was very ill, but she hated the thought of her being with the WISHARTS and would use any devious means to thwart it. (A: pg. 360 ¶ 2)

53. TIFFANY is not being properly cared for and the Courts care not, but to cover up the truth the WISHARTS have fought long and hard to bring forth for TIFFANY.

54. Proof that Judge Evans did no more than prevent the truth from being presented, and that he did not examine the evidence, is manifest by the fact that he ignored the HRS report, knowing it was fatally flawed, and turned instead to a discussion of what he, his predecesors and the co-conspirators in the Second District had done to depriving TIFFANY of the WISHARTS' protection without due process of law.

Because of the extraordinary judicial history of this case beginning in 1983, the court wishes to make the following observations:

55. WISHART concurs that the present case has an extraordinary judicial history.

56. They would point to the Article in The Florida Bar Journal, Volume LXI, No. 10, November 1987, wherein, after a statewide survey, the officers of the Family Law Section of the Bar indicted the family law system as proof of a systemic problem.

57. The WISHARTS would concur that there is a serious problem, but does not suggest more administration and specialization is the answer, but rather a return to fundamental moral values, stricter adherance and respect for the truth, and a skill in using the clean hands doctrine to both protect the integrity of the Courts, and as well the sanctity of marriage and family relationships.

58. Automatic divorce is contrary to the law, and the best interest of our society.

59. Our judges are in general not qualified to determine which marriage is irretrievably broken and which is not.

60. The result is our judges have given up, there is anarchy in the streets, and our jails are filling up with our children who "Don't know how to come in out of the rain."

61. The unique characteristic of this one case, is that, while young marriages have little hope, and can be easily devoured by our courts, in this case, when CHARLES and BOBBIE were made necessary parties, they set out to protect the marriage, the parents and TIFFANY, as is the function of the Courts in **Section 61.13, Florida Statutes (1983)** and since the Courts had abdicated, and thought they could brush away the

WISHARTS as they commonly do with the young families, there is little or no defense to a dissolution of marriage suit, the WISHARTS saw TIFFANY, and for that matter RANDY and LESLIE needed them and they took their stand on behalf of the family.

62. The proof is the arbitrary, and capricious patterns used to cut off the WISHARTS without giving them a due process hearing while now arguing they had one.

63. CHARLES happened to have a certain skill and knowledge of the law, the writs, and a willingness to use them for TIFFANY, no matter how the Courts might react.

64. WISHARTS evidence is enough to show a clear pattern of neglect, lying, immoral conduct, including substance abuse, and the Courts have no business trying to make such matters irrelevant, or to sweep them under the rug.

65. Judge Evans, in spite of his efforts, has failed to impeach the WISHARTS evidence, and there is enough to raise issues at least for LESLIE to counter, and further, after such a long pattern since 1982 to the present, WISHART should prevail.

This marriage dissolution action between Leslie Bates and Randall Bates was commenced in 1983. The Wisharts were joined as parties in the original action because of their involvement in the custody of Tiffany Bates.

66. Having developed the cause and motives for the WISHARTS being concerned for TIFFANY, and their response when sued for her return little more need be said.

On June 2, 1983 the Wisharts filed a counterclaim alleging that the natural parents were unfit to have custody of their own child and affirmatively sought to have custody granted to them.

67. WISHART filed an answer with affirmative defenses and a counterclaim to LESLIE'S complaint on June 1, 1983 (A: pgs. 63 to 66).

68. WISHARTS position that both RANDY and LESLIE were immature and needed not a divorce but help, and because of TIFFANY'S special needs, she should remain with the WISHARTS until the marriage could be worked out, and if not then, TIFFANY should reside permanently with the WISHARTS.

Leslie Bates, the natural mother, filed an answer to that counter-claim on September 21, 1983. Thereafter, a Pre-trial Order dated August 24, 1984, was entered by Judge Manuel Menendez, Jr., stating in paragraph 10(b) as follows:

69. Most of the above is technically accurate, but Judge Evans is trying to distort the fact that WISHART started with TIFFANY, and from the beginning LESLIE plead for the return of TIFFANY while the WISHARTS plead that they had her and it was in TIFFANY'S best interest that she remain with them based on moral and medical grounds.

70. The WISHARTS have never lawfully lost their original guardianship status.

71. An examination of the pretrial order (A: pg. in light of CHARLES AFFADAVIT (A: pgs. 68 to 85 will show that WISHART is not making a "petition for custody" but rather objecting that, LESLIE had not an-

swered the WISHART counterclaim, and that since John Hoft (HOFT), LESLIE'S first attorney, had argued WISHART out of their due process hearing before Judge Knowles by misrepresenting the effect of the unanswered counterclaim, WISHART had defaulted LESLIE for the failure to timely answer the counterclaim.

72. HOFT'S response was to deny knowledge of the very counterclaim he had so effectively misrepresented before to keep the WISHARTS from being heard.

73. WISHART was not petitioning for "custody" but rather trying to convince the court that a lie could not lay a predicate for an excusable neglect as would bar a default, such that under the clean hands doctrine, LESLIE'S pleadings should be dismissed with prejudice and the WISHARTS given full custody rather than the temproary primary residency BOBBIE then had.

74. LESLIE'S filing of her answer to WISHARTS' counterclaim was in response to WISHARTS' Motion for Default.

> **"Wisharts' request to grant custody of Tiffany to Wisharts and all testimony pertinent thereto shall be heard and considered by this Court at the Final Hearing in this cause."**

75. As explained above, WISHARTS' continuous pleading was to keep TIFFANY.

76. Judge Evans and the other judges will have to look elsewhere to make the WISHARTS other that respondents, counter-petitioners to LESLIE'S petition to remove TIFFANY from them.

77. WISHART in their pleadings, as has been said, were requesting that they keep TIFFANY.

At the conclusion of that Final Hearing held before Judge Menendez in December, 1984, the court entered a Final Judgement which clearly recited that the court had considered the claims of everyone involved, including the Wisharts, as to the custody of Tiffany Bates and specifically found from the evidence presented that both the natural mother and the natural father were fit parents. Shared parental responsibility was awarded to the parents and the child was to have her primary physical residence with the mother, Leslie Bates.

78. The Final Judgement so called speaks fot itself, but on it's face reflects that the matter could not be put to trial since the pleadings were not settled, and therefore the trial was beyond the jurisdiction of the court and the judgement was void, and could in no way effect the WISHARTS, or their authority over TIFFANY, neither then nor now.

The finding of fitness of the natural parents necessarily determined the Wisharts' claim for custody against them because natural parents are entitled to custody of their own children unless they are found to be unfit.

79. For there to be a finding of fitness, there had to be a legal trial, and there was not, and LESLIE has not been found to be fit.

80. As the record and WISHARTS' testimony and exhibits reflect, at the hearing before Judge Steinberg on December 20, 1987 the medical question went begging since HRS withheld WISHARTS evidence from

Dr. Lipschutz (Cf. A: pg. 301 with pg. 302) but an examination of the transcript of the hearing, on file, will show that the morals issue caused TIFFANY to be placed in BOBBIE'S care when LESLIE declined to go into the matter of her mother living with Charles Utterback without being married, that LESLIE had several live in boyfriends, one of which was Lam Ray Yarborough, etc..

81. So, for LESLIE to be found fit, she would have to show a great change, which is not manifest, for as usual she lied several times during her examination by CHARLES in his case in chief, as Judge Evans must be aware.

On April 25, 1985, Wisharts' motion for rehearing was denied. Thereafter the Wisharts took an appeal and the appellee, Leslie Bates, did not make an appearance before the Appellate Court.

82. Technically, LESLIE did make a belated appearance (A: pg. 13).

83. Regrettably, before Judge Menendez rendered the Final Judgement, Judge Evans heard CHARLES arrgue that the trial was illegal, a violation of **Rule 1.440, Florida Rules of Appellate Procedure**, since there was a motion to strike WISHARTS' last pleading, that therefore the trial and final judgement was void, and should be declared so, whether collaterally or directly, and Judge Evans declined to rule since "He was not the trial judge."

84. Regrettably, CHARLES promised Judge Evans that should the judgement be rendered, that he would return TIFFANY to LESLIE.

85. The promise should never have been given, but CHARLES honored it knowing the final judgement was void, and could be ignored, and for this respect shown to Judge Evans, the WISHARTS have been severed from TIFFANY, and she from their protection.

86. nonetheless WISHART appealed, reversed the void judgement, and no one will give them the fruits of their victory, their restoration to a position where they may watch over TIFFANY and enioy her company.

On April 2, 1986, the Appellate Court rendered the following opinion:

"The appellants [WISHART] appeal the denial of their petition for custody of their granddaughter.

The court having reviewed the record finds that appellants should have been afforded an opportunity to be heard and present evidence at the custody hearing.

We therefore reverse and remand for further proceedings consistent herewith."

87. Having developed the clear meaning of the opinion in light of the true nature of the appeal, and the record on appeal which was the basis for the reversal, WISHART states that they have been unlawfully deprived of TIFFANY without due process of law.

88. In light of the appeal brief, and the index to what constituted the record on appeal, it becomes clear that Judge Evans has been badly misled by the court house gossip to a ludicrous conclusion that WISHART misled the Second District Court of Appeal

to believe that the WISHARTS were not given a " . . . hearing on their counterclaim." for that is what we find Judge Evans saying, and worse acting on when he says:

> **It is clear from this opinion that the Second District Court of Appeals was under the impression that Judge Menendez had not afforded the Wisharts a hearing on their counter-claim.**

89. CHARLES tried to explain the matter to Judge Evans at his "closing argument".

90. All that is clear, is that Judge Evans has been misled, but not by the WISHARTS, for their motions are full of explanations as to what occured, so as to be reinstated to their prior lawful status, so that eventually a lawful trial might be held.

91. What seems most grevious, is that Judge Evans does not read WISHARTS' pleadings and motions, voluminous as they have regrettably become, or if he does, it is to find a portion, taken out of context, to prove what he thinks he knows, but does not.

> **Upon remand the undersigned, as presiding judge of Family Law Division "D", went forward with another hearing on the WISHARTS' counter-claim.**

92. As WISHART has stated previously, Judge Evans did indeed go forward with a trial, over their protests that their evidence was old, and that caused by the courts abuses, that a fair trial could not be held, without use of the clean hands doctrine to even things out, which would have left TIFFANY in the WISHART home with the WISHARTS working to develop a work- ing relationship with LESLIE.

The court has held hearings on the Wisharts' counter-claim for five days on the following dates: June 23, June 24, September 15, September 16, and December 14, 1987.

93. It is true that there were hearings on those days.

92. It was notable how often Judge Evans would insult the WISHARTS by reflecting how old their evidence was, and that it bore evidence stamps from Judge Menendez.

93. Could Judge Evans actually believe that the WISHARTS had lied to the Appellate Court, that the reversal was a sham, and therefore the WISHARTS worthy of no more that the abuse and summary dismissal–they have received?

94. At one hearing as WISHART was packing to leave Judge Evan made the following statement in a gruff and menancing manner:

"Get out of my court. Get out of here.

95. There has been no justification for such treatment, and little explanation save for the distortions caused by idle gossip.

96. No one has actually enquired as they should as to what the WISHARTS are saying to ascertain the truth of the matter.

During the presentation of their case the Wisharts repeatedly offered in evidence exhibits which had been earlier tendered to and received by Judge Menendez. The record reflects that the Wisharts

offered and Judge Menendez received in evidence on their behalf at least (19) photographic, other physical objects and documentary exhibits. Just for an example, Wisharts' Exhibit #4 received by this judge bore an evidence stamp by Judge Menendez indicating he had received the identical exhibit as Wisharts' Exhibit #17 baby's clothing). This is just one example of this matter. On more than one occasion during the five days of hearings conducted before the undersigned, it became apparent that the undersigned was hearing oral testimony which had also been presented to Judge Menendez for his consideration on the custody claims.

97. Just perhaps Judge Evans has been misled by fellow judges who he trusted too much, as they were trying to cover their own mistakes, perhaps.

98. It is quite reasonable to the WISHARTS to use the same evidence, and they will do so again should they be able to overturn this last denial of a fair hearing.

The record would seem to be clear that the Wisharts were in fact given an opportunity to be heard and to present evidence on their custody claim before Judge Menendez in 1984 and they have now had an additional five days of hearing in 1987 before the undersigned on the same claims.

99. WISHART originally estimated before the Menendez trial that the case would take at least five days to try.

100. Since much of their evidence as to morals, lying, violence, etc. has not been opened to their proofs,

nor were they allowed to strike the HRS report prepared by Mrs. Murphy, and since LESLIE did not have to put on any evidence to prevail, it is simple to conclude that the full and legal trial could go ten days to two weeks.

101. Of course Judge Menendez held a trial over WISHARTS' objections, for to walk out a manifest mistrial would bring a dismissal for want of prosecution.

102. That is true of the Menendez trial and WISHART would hope for the same result with the present trial wherein they have been deprived of their lawful status.

103. In any case, WISHART have misled no one.

104. WISHART is quite concerned that the misconceptions shown by Judge Evans is spread throughout the Court House and to the Appellate Judges as well, for there seems no other explanation for their arbitrary and illegal rulings if WISHART is not somehow conceived as someone other than a couple fighting for a child's welfare.

It is, therefore,

ORDERED AND ADJUDGED, that the motion of the counter-defendant, LESLIE BATES, natural mother of the minor child, Tiffany Bates, for involuntary dismissal of the counter-claim for custody filed by CHARLES F. WISHART and BOBBIE SUE WISHART be and the same is hereby granted and said counter-claim is dismissed.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 17th day of

December 1987, NUNC PRO TUNC December 14, 1987.

/S/
VERNON W. EVANS, JR., CIRCUIT JUDGE

105. Whether from misrepresentation from persons Judge Evans trusted to his and the WISHARTS harm, not to mention TIFFANY, nonetheless, the hostile attitude shown toward the WISHARTS by Judge Evans is inexcusable, and he should have recused himself for prejudice, a prejudice that is unwarranted.

106. The only proper resolution of this matter at this stage would be to reinstate the WISHARTS, allow them time with TIFFANY, to develop a pattern, and then after a number of months if not a year or more, to bring the matter to trial.

107. In addition, some means needs to be instigated to prevent the recurrance of what has happened to WISHART and many others.

108. WISHART has a legitimate claim, and must not be thrown out of Court as has happened on the basis of Judge Evans misconceptions.

WHEREFORE, the WISHARTS move the Court to reverse the Order of dismisal, to declare a mistrial and restore TIFFANY to the WISHARTS.

Respectfully submitted,

/s/
BOBBIE SUE WISHART
Phone: (813) 685-1240
410 West Bloomingdale
Brandon, Florida 33511-7402

/s/
CHARLES F. WISHART
Attorney at Law
Bar. No. 095782

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was furnished this 28th day of December 1987 to **LEE ELLEN ACEVEDO, Esquire;** Family Law Centers of Chawk and Associates; 1905 West Busch Boulevard; Tampa, Florida 33612; and to **RANDALL A. BATES;** 410 West Bloomingdale; Brandon, Florida 33511-7402.
Delivery by HAND [*] MAIL [x]

/s/
BOBBIE SUE WISHART

/s/
CHARLES F. WISHART

* Hand delivery to RANDY.
x Mail delivery to LESLIE.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

FAMILY LAW DIV.

IN RE: THE MARRIAGE OF

No. 83-7250

LESLIE M. BATES (BOGGS), wife/ petitioner and counter-respondent

DIVISION "D"

and

RANDALL A. BATES, Husband/respondent, Counter-petitioner and cross-respondent

and

CHARLES F. WISHART, Cross & Counter-petitioner and BOBBIE SUE WISHART, Cross & Counter-petitioner

ORDER DENYING WISHARTS' MOTION FOR NEW TRIAL AND FOR REHEARING AND DENYING BATES' MOTION FOR ATTORNEY'S FEES

THIS CAUSE is before the court on post-trial motions following the netry of an order granting motion for involuntary dismissal of the Wisharts' counter-claim for custody of Tiffany Bates, and on Bates' motion for an award of attorney's fees.

It is evident from the argument that the Wisharts have misconstrued the court's order granting motion for involuntary dismissal. In the first paragraph of that order the court found, considering the evidence in a light most favorable to the Wisharts, that they had failed to establish the right to relief sought, to-

wit: custody of Tiffany Bates, and this ruling, of course, was based on the evidence presented before this judge during a five-day hearing and the order was granted at the close of the Wisharts' evidence. The references to the judicial history of the case and the proceedings before Judge Menendez were merely historical observations and did not form a basis of the court's ruling.

After consideration of all the arguments made on behalf of the Wisharts, the court finds no merit in their post-trial motions.

Bates' motion to award an attorney's fee is based upon Florida Statutes 57.105. The court is unable to find that there was a complete absence of any justiciable issue of either fact or law and therefore the motion to award attorney's fees must be denied.

It is, therefore,

ORDERED AND ADJUDGED that Wisharts' motion for new trial and rehearing of the order, etc., filed December 28, 1987, and Wisharts motion for rehearing be and the same are hereby denied;

and it is further

ORDERED AND ADJUDGED that Bates motion to award an attorney's fee be and the same is hereby denied.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 16th day of February, 1988.

Ver W Evans Jr

VERNON W. EVANS, JR., CIR. JUDGE

Copies furnished to:

CHARLES F. WISHART, ESQ.,
410 West Bloomingdale,
Brandon, Florida 33511-7402.

BOBBIE SUE WISHART,
410 West Bloomingdale,
Brandon, Florida 33511-7402.

LEE ELLEN ACEVEDO, ESQ.,
1905 West Busch Blvd.,
Tampa, Florida, 33612.

EXCEPTS FROM THE WISHARTS' INITIAL BRIEF IN WISHART v. BATES, 487 So.2d 342 (Fla. 2d DCA 1986), Appellate Case No. 85-1128

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Respectfully submitted,

Bobbie S. Wishart

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